LEOW NYOK CHIN (NO 2)

v.

PP

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CRIMINAL APPEAL NO: 41-179-98]
15 JANUARY 1999

CRIMINAL PROCEDURE: *Bail - Non-bailable offence - Offences punishable by death or life imprisonment - Jurisdiction of Magistrate's Court - Whether Magistrate Court has jurisdiction to hear application for bail notwithstanding lack of jurisdiction to try such offences - Criminal Procedure Code, s. 388(i)*

CRIMINAL PROCEDURE: *Jurisdiction of court - Magistrate's Court - Bail - Non-bailable offence - Offences punishable by death or life imprisonment - Whether Magistrate Court has jurisdiction to hear application for bail notwithstanding lack of jurisdiction to try such offences - Criminal Procedure Code, s. 388(i)*

CRIMINAL PROCEDURE: *Appeal - Bail, refusal of by Magistrate Court - Case transmitted to High Court prior to hearing of appeal - Fresh application for bail refused by High Court prior to hearing of appeal - Whether case can be remitted to Magistrate to rehear application for bail - Whether High Court ought to consider granting bail - Whether appeal rendered academic*

The appellant, a woman, is charged with murder and this was her appeal against the magistrate's decision refusing bail. The magistrate had not considered the application for bail on its merits as he believed that the magistrate's court had no jurisdiction to consider an application for bail in a murder case since the court has no jurisdiction to try a murder case in the first place.

Prior to the hearing of this appeal, certain material events had taken place. The case was transmitted pursuant to s. 177A(2) of the Criminal Procedure Code ('the CPC') for trial by the High Court and the appellant applied for bail shortly after entering her plea. The bail application was refused by the High Court and notwithstanding this, the appellant submitted that this court can still make an order granting bail.

Held:

[1] The proviso to s. 388(i) of the CPC specifically deals with persons who are under the age of 16 years, is a woman or is sick or infirm and does give to "the Court" before whom such a person is brought, power to consider an application for bail. This is notwithstanding that the offence the person applying for bail is accused of is punishable with death or life imprisonment.

[2] Bail in respect of non-bailable offences is governed by s. 388 of the CPC which states that it is "the Court" that considers whether or not to grant bail. The word "Court" is defined in s. 2 of the CPC to mean the High Court, a Sessions Court or the court of a magistrate of any class, as the context may require. The word "Court" in s. 388 of the CPC therefore includes a magistrate's court before whom a person charged for an offence punishable with death or life imprisonment is brought.

[3] The proviso to s. 388(i) of the CPC is clear and unambiguous and gives to the court, which term includes a magistrate's court, a discretion, in those limited classes where the accused person is under sixteen, a woman or is sick or infirm, to consider the grant of bail notwithstanding that the person is charged with an offence punishable with death or life imprisonment.

[4] Whilst the proviso to s. 388(i) of the CPC does confer upon a magistrate's court power to consider an application for bail in the circumstances stated in the proviso, whether or not bail is actually granted is a matter which a magistrate must decide on the merits disclosed in each particular case and in accordance with settled legal principles upon which a judicial discretion is exercised.

[5] No useful purpose would be served in reversing the order of the magistrate because in so doing, two options would be open to this court. Firstly, to remit the matter back to the magistrate for him to consider the application for bail on its merits. However, as the case has been transmitted to the High Court, this option is no longer available. The second option would be for this court to consider the grant of bail. This again would not be an appropriate step as this court had already heard the appellant's bail application on its merits and refused it.

[Appeal dismissed.]

Cases referred to:
Lorraine Phylis Cohen v. PP [1989] 2 CLJ 131 ***(refd)***
PP v. Latchemy [1967] 2 MLJ 79 ***(foll)***
PP v. Wee Swee Siang [1948] MLJ 114 ***(aff)***
Sulaiman Kadir v. PP [1976] 2 MLJ 37 ***(dist)***

Legislation referred to:
Criminal Procedure Code, ss. 2, 117, 117A(2), 177A(3), 316(c), 342(3), 388(i), (v), 389
Penal Code, ss. 302

Other source referred to:
Maxwell On Interpretation of Statutes, 11th edn, p 2

For the prosecution - Murtazadi Amran
For the accused - Hira Singh; M/s Asbir, Hira Singh & Co

Reported by S Dharmendran

JUDGMENT

Clement Skinner JC:

Leow Nyok Chin (hereafter the appellant) who is charged with murder under s. 302 Penal Code (PC) was produced before the magistrate, Batu Gajah, on 4 November 1998 when she applied for bail but was refused it. Being dissatisfied with such decision she has brought this appeal.

The record of appeal reveals the facts leading up to her bail application to be as follows:

(i) On 23 July 1998, the appellant, a 58 year old woman surrendered herself to the police whereafter she was remanded in custody for the next 14 days till 5 August 1998.

(ii) On 5 August 1998, a charge under s. 302 PC was registered at the magistrate's court whereafter the charge was read to the appellant but no plea taken. At that date, the Public Prosecutor had not given his consent to the institution of proceedings against the appellant.

(iii) On the same day, that is 5 August 1998, the magistrate acting under the provisions of s. 342(3) Criminal Procedure Code (CPC) on the request of the prosecution, sent the appellant to Hospital Bahagia, Ulu Kinta, for medical observation.

(iv) On 3 September 1998, the magistrate, at the request of Hospital Bahagia ordered the appellant to continue to remain at the hospital for observation till 5 October 1998.

(v) On 5 October 1998, the magistrate, at the request of Hospital Bahagia, ordered the appellant to continue to remain at the hospital for a further period of observation till 4 November 1998.

(vi) On 30 October 1998, Hospital Bahagia sent its medical report on the appellant to the magistrate's court.

(vii) On 4 November 1998, the appellant was brought before the magistrate. It was then that her application for bail was made. When her application was made, the Public Prosecutor had still not consented to the institution of proceedings against the appellant.

The learned magistrate refused bail for the following reasons:

(a) before considering the merits of the application, the court needed to interpret the statutory provision on the powers of the court to hear the application;

(b) no valid reasons had been given to show that the court could hear the application for bail when a magistrate's court has no jurisdiction to try a murder case. If at all there is to be any bail granted until trial, the application should be heard by the court with jurisdiction to try the case, that is, the High Court;

(c) the case was in its early stages and still had not been referred to the Public Prosecutor to determine the proper charge on the facts.

It is against the above orders that this appeal is brought. The learned magistrate has since then, on 16 November 1998, given his full reasons (hereafter grounds of decision) for making the above orders.

In arguing this appeal, Mr. Hira Singh, learned counsel for the appellant has urged this court to ignore the grounds of decision delivered on 16 November 1998 as counsel considers it a second judgment, written or delivered quite contrary to law. Counsel cites the case of *Lorraine Phylis Cohen v. PP* [1989] 2 CLJ 131 where the then Supreme Court clearly laid down that a second written judgment or grounds of decision cannot be delivered to supplement a first decision.

I must at once say that I do not regard the grounds of decision delivered on 16 November 1998 by the learned magistrate to be a second decision given to supplement the order made on 4 November 1998. It is apparent to me that as his decision of 4 November 1998 was being appealed against, the learned magistrate was merely complying with the requirement that he should state fully his reasons for refusing bail.

Reverting to the appeal brought, the petition of appeal makes reference to certain acts and orders of the learned magistrate prior to 4 November 1998. These are to be found in ground two of the petition of appeal. In particular, reference has been made to the order made on 5 August 1998 remanding the appellant in custody after the initial remand period of 14 days under s. 117 CPC had expired. Also criticised, are the orders made pursuant to s. 342 CPC, to have the appellant sent to Hospital Bahagia for observation. These orders are not the subject of appeal and I find they are not strictly relevant to the question whether or not the decision of the magistrate made on 4 November 1998 was correct. I therefore decline to deal with them.

As regards the complaints on the magistrate's refusal to grant bail, which constitutes grounds three and four of the petition of appeal, learned counsel for the appellant submits that the learned magistrate failed to properly direct himself on the provisions of law relating to the grant of bail to a person such as the appellant and particularly to s. 388 CPC.

From the grounds of decision and especially the order made by the learned magistrate on 4 November 1998 it is evident to me that the learned magistrate had not in fact considered the application for bail on its merits. He did not do so as he believed that a magistrate's court had no power or jurisdiction to consider an application for bail in a murder case, especially now that the entire provisions in the CPC relating to the holding of preliminary inquiries into offences triable by the High Court have been abolished. The learned magistrate does give other reasons for refusing bail such as there being no formal prosecution commenced against the appellant yet and that investigations were still at an early stage, but I believe what weighed most heavily on the learned magistrate's mind was a lack of any provision of law allowing him to consider the bail application.

In my judgment, the learned magistrate had misdirected himself on the law because whilst he did refer to s. 388(i) CPC and say that a case of murder cannot be treated like other non-bailable offences, the learned magistrate did not sufficiently direct his mind to the proviso to s. 388(i) CPC which specifically deals with persons who are under the age of 16 years, is a woman or is sick or infirm. Had he done so, he would have found that the proviso to s. 388(i) CPC does give to "the court" before whom such a person is brought, power to consider an application for bail, notwithstanding that the offence the person applying for bail is accused of is punishable with death or life imprisonment. My reasons for saying so follow.

The offence of murder under s. 302 PC is shown in the first schedule of the CPC as not bailable. Bail in respect of non-bailable offences is governed by s. 388 CPC. This section states that it is "the court" that considers whether

or not to grant bail. The word "court" is defined in s. 2 CPC as meaning the High Court, a Sessions Court, or the court of a magistrate of any class, as the context may require. The word "court" in s. 388 CPC therefore includes a magistrate's court before whom a person charged for an offence punishable with death or life imprisonment is brought.

What then is the position where that person is a woman? Can a magistrate consider her application for bail? I say that answer must be in the affirmative because to hold otherwise would ignore the very words of the proviso to s. 388(i) CPC and result in the proviso being rendered meaningless. In my judgment, the proviso to s. 388(i) CPC is clear and unambiguous and gives to the court, which term includes a magistrate's court, a discretion, in those limited cases where the accused person is under sixteen, a woman or is sick or infirm, to consider the grant of bail notwithstanding that the person is charged with an offence punishable with death or life imprisonment. There is nothing in the section to suggest that the words of the proviso are not to be given effect to in their plain ordinary meaning. I would here refer to *Maxwell on Interpretation of Statutes* 11th. Edn. p. 2 where it is stated:

> If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature.

I feel I cannot leave this subject without making reference to the case of *Sulaiman bin Kadir v. PP* [1976] 2 MLJ 37, a case in which the powers of a subordinate court to grant bail in cases involving punishment of death or life imprisonment was considered, and to distinguish it in so far as cases involving the proviso to s. 388(i) CPC is concerned.

In *Sulaiman's* case, the accused who was charged with rape, an offence punishable with imprisonment for life under s. 376 PC, applied for and was refused bail by the President of the Special Sessions Court under s. 388(i) CPC. The accused then asked the High Court to grant bail on exceptional and special reasons. In considering whether to grant bail, Harun J (as he then was), at p. 37, said:

> There is abundant authority, the most recent being *Shanmugam v. PP* that a Subordinate Court has no power to grant bail if there are reasonable grounds for believing that an accused person has been guilty of an offence punishable with death or life imprisonment.

In making the above statement, the learned judge clearly did not have in mind the proviso to s. 388(i) CPC because there appears just two sentences below the above quoted passage the following words:

> There are some exceptions when bail may be granted in such cases but these do not apply to this case.

Later on in the same judgment, the learned judge, went on to consider whether or not there were exceptional and special grounds to grant the accused bail. He found there were because in that case, the accused was going to be tried by a Special Sessions Court President who had been conferred with special jurisdiction to hear rape cases. However, having been conferred with such jurisdiction, the Special Sessions Court President was not given other powers exercisable by a High Court judge such as the power to grant bail under s. 389 CPC. This created an anomalous situation. Whereas a judge could consider granting bail in a rape case, the Special Sessions President could not, even though both were empowered to try the same offence. It was in the above context that Harun J made the following statement:

> As a matter of principle, I think a court that has been conferred with jurisdiction to try a case should also be given discretionary powers to grant bail. This would be in keeping with the provisions of the Criminal Procedure Code, where magistrates possess the unfettered power to grant bail in all cases including cases not triable by them, except offences punishable with death or life imprisonment where only a judge may grant bail.

When the above passage is considered in its proper context it will be seen that the learned judge was not in fact considering the question of the powers of a magistrate to grant bail pursuant to the provisions of s. 388(i) CPC, and in particular the proviso thereto when he made the above statement.

In support of my view that a magistrate's court does have power to consider granting bail to those persons mentioned in the proviso to s. 388(i) CPC notwithstanding that the offence they are charged with carries the death sentence or life imprisonment, I rely on the case of *PP v. Latchemy* [1967] 2 MLJ 79. In that case the accused, a woman, charged with murder under s. 302 PC applied for bail pursuant to s. 388(v) CPC to the magistrate who granted it. On appeal to the High Court the magistrate's decision was overruled, not because the magistrate had no power to grant bail in a case involving murder, but because the grounds upon which bail was granted fell far short of being exceptional and very special reasons. It is clear from a reading of the case that the power of the magistrate to grant bail under s. 388(i) CPC was never questioned. It should also be noted that the accused Latchemy applied for bail under the provisions of s. 388(v) of the Criminal Procedure Code (Cap 6), which like the present s. 388(i), had an exception to it that where the accused is a woman, bail is still at the discretion of the court. In referring to that exception this is what Pawan Ahmad J said at p. 79, para (d) of the case, "The general rule under s. 388(v) of the Criminal Procedure Code is that the court should not grant bail to a person charged

with an offence punishable with death. One of the exceptions to this rule is that the court may grant bail to a woman accused. In my view this exception is a discretion which should be exercised sparingly and judiciously depending on the reasons of each particular case ... The criterion by which a magistrate should allow bail in cases of this type, in my view, is only in those cases where he is convinced that the reason put forward by the applicant are said to be exceptional and very special reasons."

My reading of the judgment in *Letchemy's* case is that the learned judge was clearly of the view that a magistrate had a discretion to "allow bail in cases of this type", that is, where the exception to the section was under consideration.

I must however make it clear that whilst in my opinion, the proviso to s. 388(i) CPC does confer upon a magistrate's court power to consider an application for bail in the circumstances stated in the proviso, whether or not bail is actually granted is a matter which a magistrate must decide on the merits disclosed in each particular case and in accordance with settled legal principles upon which a judicial discretion is exercised (*PP v. Wee Swee Siang* [1948] MLJ 114).

Having concluded that the learned magistrate had erred, I now need to decide on an appropriate order to make because since the filing of the petition of appeal and before the hearing of this appeal on 16 December 1998, certain material events have taken place which have a direct bearing on the order I should make in this appeal.

On 3 December 1998, the Public Prosecutor consented to the institution of these proceedings against the appellant and in accordance with the provisions of s. 177A(2) CPC, the case was transmitted by the magistrate's court, Batu Gajah, for trial by the High Court, Ipoh.

On that very day, the appellant was produced in this court where in accordance with the provisions of s. 177A(3) CPC, the charge was read to the appellant and her plea taken. The appellant claimed trial to the charge whereupon her trial was fixed to commence on 26 April to 30 April 1999.

Immediately thereafter, the appellant applied for bail and I heard full arguments on the merits of her application from both learned counsel for the appellant and the learned Deputy Public Prosecutor (DPP) who opposed the application. I reserved my decision till 11 December 1998 when I refused bail and in so doing gave full reasons in writing. I also ordered that the appellant be remanded till her trial at Kajang Prison.

In her petition of appeal, the appellant seeks the following Orders:

Your petitioner prays that the Orders of the learned magistrate may be reversed or such order may be made thereon as justice may require in particular that the accused/appellant be granted bail:

(a) pending the arrival of the consent of the Deputy Public Prosecutor; and/or

(b) pending the transmission of the case to the High Court; and/or

(c) pending further investigation under s. 388(ii) CPC; and/or

(d) pending the trial, if any, before any such court;

(e) alternatively, the accused be remanded at the security ward of the Hospital Bahagia, Tanjung Rambutan, Perak Darul Ridzuan.

In light of the events that have now taken place, the request for bail in the circumstances mentioned in prayers (a), (b), (c), (d) and the order sought in prayer (e) of the appellants' petition are no longer relevant, available or appropriate to be made as the circumstances mentioned therein are no longer 'live' issues. The learned DPP has in fact submitted that the orders sought are no longer available.

Learned counsel for the appellant submits however that this court can still make an order granting bail since it has been expressly prayed for.

Section 316 CPC sets out the orders that a court may make on the hearing of an appeal. Since this is an appeal against the refusal of bail, the only relevant provision is s. 316(c) CPC. This court may either dismiss the appeal or "alter or reverse such order" made by the learned magistrate. Bearing in mind that the decision was one of refusal to grant bail, the only meaningful order I could make is to reverse the order of the learned magistrate. However, no useful purpose would be served in so ordering because in reversing such order, two options would be open to me:

(a) to remit the matter back to the learned magistrate for him to consider the application for bail on its merits. This option is however not available as the appellant's case is no longer before the magistrate, it having been transmitted to the High Court, or

(b) to consider the grant of bail myself. This would not be an appropriate step now as I have already on 3 December 1998 heard the appellant's bail application on its merits and refused it.

In the peculiar circumstances that have now arisen, whereby events have rendered my finding academic, I find the appropriate order to make is to dismiss the appeal which I now do.